

MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-180

HENRY SMITH, *etc.*, *et al.*,

Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-183

BERNARD SHAPIRO, *etc.*, *et al.*,

Appellants-Defendants,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-5193

NAOMI RODRIGUEZ, *etc.*, *et al.*,

Appellants-Intervenors,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

No. 76-5200

DANIELLE and ERIC GANDY, *etc.*, *et al.*,

Appellants-Plaintiffs,

—against—

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, *etc.*, *et al.*,

Appellees-Plaintiffs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF THE PUERTO RICAN FAMILY INSTITUTE, INC. AND
THE PUERTO RICAN ASSOCIATION FOR COMMUNITY
AFFAIRS FOR LEAVE TO FILE BRIEF *AMICI
CURIAE* AND BRIEF *AMICI CURIAE***

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MOTION OF THE PUERTO RICAN FAMILY INSTITUTE, INC. AND THE PUERTO RICAN ASSOCIATION FOR THE COMMUNITY AFFAIRS FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Puerto Rican Family Institute, Inc., (the "Institute") and the Puerto Rican Association for Community Affairs, Inc., ("PRACA"), respectfully move this Court pursuant to Rule 42(3) for leave to file the attached brief amici curiae.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief. All parties to this appeal have granted their consent except for the appellees who do not oppose the filing of this brief amici curiae.¹

¹ The letters of consent have been filed with the Clerk of this Court.

The Institute and PRACA are non-profit corporations based in New York City and serve the New York Puerto Rican community. The Institute was founded and incorporated in 1962; PRACA was founded in 1953 and incorporated in 1960.

The Institute actively provides social work, educational, psychiatric, and psychological services to maintain and strengthen troubled Puerto Rican families as part of a Comprehensive Child Placement Program. It vigorously strives to support these families and thereby prevents the need for foster care placement and promotes the return to natural parents of Puerto Rican children in foster care.

PRACA is a community based service organization providing omnibus juvenile, youth and family services to support and fortify distressed Puerto Rican families. As part of their overall

efforts, PRACA is now establishing an authorized child care agency primarily designed to promote conditions favorable to the return of Puerto Rican children to their natural parents.

The district court's requirement that an adversary hearing be held before children voluntarily and temporarily placed in foster care for more than one year are returned to their natural parents, has a disproportionate impact upon the Puerto Rican family. While Puerto Ricans comprise only 10% of the total population of New York City, 25.5% of all children in foster care placement in New York City are Puerto Rican.² Moreover, at least 68.9% of Puerto Rican children in foster care in New York City have

² David Fanshel and John Grundy, "Computerized Data for Children in Foster Care", Table 2: Ethnicity of Children in Foster Care, November, 1976, (published by Child Welfare Information Services, 200 Madison Ave., New York, New York).

been voluntarily placed into foster care.³

Initial voluntary foster care placement in New York, as reflected in State statutes, is designed and intended to be a temporary arrangement where the family is briefly separated to be reunited when transient familial problems have been resolved.

The impact of the district court's decision is to place an unnecessary obstacle to maintaining Puerto Rican family unity already threatened by unemployment,

³ *Id.* at Table 21: Court adjudicated Status of Children in Foster Care. To determine the percentage of voluntary placements three categories were combined: "No Court Involvement;" "#392-FC Reauthorized;" and, "#358A-FC Approved." These three categories apply only to voluntary placements.

inferior education and poverty.

The Institute and PRACA request leave to file the attached brief amici curiae in order to focus the Court's attention on selected issues raised by this appeal and upon the adverse impact of the district court's decision on the Puerto Rican family.

Respectfully submitted,

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⁴ A recent report of the United States Commission on Civil Rights, Puerto Ricans in the Continental United States: An Uncertain Future, October, 1976, documents the poverty, unequal educational opportunity, language barriers, unemployment and family disintegration plaguing Puerto Ricans.

INTEREST OF AMICI CURIAE

The interest of the amici curiae is set forth in the accompanying motion, supra.

QUESTIONS PRESENTED

- 1) Whether a case or controversy is present in this case to confer jurisdiction upon the district court under Article III section 2 of the Constitution of the United States to determine that New York Social Services Law §§ 383(2) and 400 (McKinney 1976) and the New York Code of Rules and Regulations § 450.10 (1974) violate the rights of foster children under the due process clause of the Fourteenth Amendment to the Constitution of the United States?
- 2) Whether New York Social Services Law §§ 383 (2) and 400 (McKinney 1976) and the New York Code of Rules and Regulations § 450.10 (1974) violate the due

process clause of Fourteenth Amendment to the Constitution of the United States insofar as they authorize the State to return to natural parents their children who were voluntarily and temporarily placed into foster care without providing foster parents and foster children a full evidentiary hearing in an organized forum?

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case involving an omnibus attack by foster parents upon the constitutionality of state procedures accorded foster parents prior to the removal or transfer of foster children boarding in their home. In response to this attack, the district court granted due process rights to children who opposed the imposition of additional procedures.

Amici do not submit this brief in order to present the Court with exhaustive argument on the application of due process to the removal or transfer of

foster children. It is the purpose of this brief to isolate certain issues respecting procedures required prior to the return to natural parents of children voluntarily placed into foster care raised by the lower court opinion and to demonstrate the following: 1) the district court had no jurisdiction to determine that children voluntarily placed into foster care are entitled to an evidentiary hearing in an organized forum before they are returned to their natural parents; and, 2) foster parents are not entitled to a due process hearing as imposed by the lower court in addition to constitutionally adequate state procedures already accorded to them, prior to the return to natural parents of voluntarily placed foster children.

The foster parents commenced this action on behalf of themselves and the

foster children jointly, asserting a right to a due process hearing prior to the return of the children to their natural parents. Recognizing that foster parents and children have no identity of interest in this case, the lower court appointed independent children's counsel. The children's counsel consistently argued that foster children have a right to placement in their best interest which is satisfied by existing state procedures; that a federal court-imposed due process hearing is not in the children's best interest; and, that foster parents have no constitutionally cognizable interest in the foster family relationship. The district court's holding that children have procedural due process rights was grounded upon claims and arguments made by the foster parents who had no standing to raise those claims. Single-

ton v. Wulff, U.S. 49 L.Ed. 2d 826 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1952). By determining children's rights on the basis of claims made by a party who had no standing to raise them and opposed by the only party who had such standing - the children themselves - the district court adjudicated a matter which was not a case or controversy under Article III, section 2 of the Constitution of the United States. Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962).

In the instant case, foster parents seek due process protection for a voluntarily placed foster child boarding in their home under a written instrument which reserves to an authorized child care agency the sole discretion to terminate the placement at any time.

The foster parents present no liberty or property interest protected by the due process clause of the Fourteenth Amendment. Foster parents have no "legal entitlement" to the relationship within the meaning of Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) and their progeny. The relationship is not within the zone of personal liberty and familial privacy recognized by this Court in Stanley v. Illinois, 405 U.S. 645,651 (1972); Wisconsin v. Yoder, 405 U.S. 205, 232 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); May v. Anderson, 345 U.S. 528, 533 (1953); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); and Meyer v. Nebraska, 262 U.S. 390 (1923).

Even if the foster parent-child relationship is entitled to the protections of the due process clause,

existing review procedures already offer a constitutionally adequate opportunity to be heard prior to the return of a child to his natural parents. The requirements of due process are flexible and depend upon a balancing of the affected governmental and private interests, and the risk of erroneous determinations. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Morrisey v. Brewer, 408 U.S. 471, 481 (1972); Mathews v. Eldridge, U.S. ___, 47 L. Ed. 2d 18, 33 (1976). Where there are two conflicting private interests, the review procedures must accommodate both. Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).

The primacy of the natural parent-child relationship was recognized by this Court in Stanley v. Illinois, 405 U.S. 645 (1972); May v. Anderson, 345

U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). Under New York law, the parent of children voluntarily and temporarily placed in foster care do not relinquish their parental rights and they are entitled to the return of their children unless adjudicated neglectful, abusive, or otherwise unfit. New York Social Services Law §384-a (McKinney 1976).

Where the foster parent-child relationship has gone on for eighteen months or more, existing procedures provide the foster parents a full evidentiary hearing prior to the return of a child to his natural parents. Where the relationship has lasted less than eighteen months, the State, finding that the interests of the foster parents are minimal, still affords them a pre-termination conference to contest the return of the child to his

natural parents. In light of the State's interest in preserving and reuniting the natural family and protecting children, these procedures provide foster parents with an opportunity to dispute the return of the child to his home without unnecessarily delaying the reunion of the natural family or jeopardizing the welfare of the child. While the child may not initiate these proceedings, extensive child-care agency investigations and the opportunity for foster parent initiation of existing procedures adequately protect against erroneous decisions to reunite the natural family. Due process review procedures are fashioned to protect against error in "the generality of cases, not the rare exceptions." Mathews v. Eldridge, supra at 39.

Existing procedures strike a

constitutional accommodation of all the concerned private interests and the State's interests and effectively guard against erroneous determinations.

ARGUMENT

I

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE A MATTER WHICH WAS NOT A CASE OR CONTROVERSY UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION OF THE UNITED STATES

This Court has consistently prohibited federal courts from assuming jurisdiction over and adjudicating issues in the absence of an actual case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States. Singleton v. Wulff, 432 U.S. ___, 49 L. Ed 2d. 826, 832 (1976); Warth v. Seldin, 422 U.S. 490, 498-99 (1976); Schlesinger v. Reservists To Stop The War, 418 U.S. 208, 215 (1974); United States v. Richardson, 418 U.S. 166, 171 (1974); Flast v. Cohen, 392 U.S. 83, 95-105 (1968); Baker v. Carr, 369 U.S. 186, 204-205 (1962); United States v. Raines,

362 U.S. 17, 20-21 (1960). Courts may not hear and decide lawsuits where there is no genuine adversary issue between the parties.

Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47, 48 (1971); United States v. Johnson, 319 U.S. 302, 305 (1943); Muskrat v. United States, 219 U.S. 346, 361 (1911). Advisory opinions are forbidden, in part, in order to implement the separation of powers implicit in the Constitution and to confine the federal courts to the role assigned them by Article III.¹ Flast v. Cohen, supra at 96; United States v. Fruehauf, 365 U.S.

1

The relationship between requiring federal courts to adjudicate only cases or controversies and maintaining a separation of powers was reflected in correspondence between then Secretary of State Thomas Jefferson and Chief Justice John Jay in 1793. In response to Secretary Jefferson's request to the Court for advice on the construction of certain United States laws and treaties, the Chief Justice replied:

We have considered the previous question...[regarding] the lines of separation drawn by the Constitution

146, 167 (1961). See also Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring); Blair v. United States, 250 U.S. 273, 279 (1918); Liverpool, New York and Philadelphia Steamship Company v. Emigration Commissioners, 113 U.S. 33, 39 (1884).

In determining whether a case or controversy exists, and whether one party has standing to raise the rights of another, this Court has sanctioned a case by case assessment of relevant factors including whether there is a relationship

I Cont'd.

between the three departments of the government. These being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to

which insures equally effective assertion of rights, Singleton v. Wulff, supra at 833-34, or whether there is an obstacle to the assertion of rights by the individuals whose rights are at stake, NAACP v. Alabama, 357 U.S. 449 (1958). Any reasonable assessment of these factors should have compelled the district court to decline jurisdiction over the question of whether the children have a protected interest in the foster parent-child relationship within the meaning of the Fourteenth Amendment.

Appellee foster parents brought this action in the district court jointly on behalf of themselves and foster children. At the outset, the district court, recognizing that foster parents and foster children have no identify of

1 Cont'd.

the executive department. 3
H. Johnston, Correspondence and
Public Papers of John Jay, 486-
89 (1891).

interest in this litigation, sua sponte appointed independent counsel to represent the children. Through their counsel, the children have consistently asserted that they have no protected interest in the foster family relationship which mandates a due process hearing; that an adversarial due process hearing imposed by the federal courts is unnecessary and not in their interest; and, that the foster parents have no independent constitutionally cognizable interest in the foster family relationship.

Contrary to its threshold ruling that foster parents could not speak for the children, the district court ultimately superimposed upon the children arguments and claims which they had vigorously opposed throughout the litigation and which were made only by the foster parents who lacked the standing

to raise those arguments and claims. As a result, the district court found existing procedures constitutionally defective and imposed additional due process hearing requirements ostensibly for the benefit of the foster children who expressly eschewed a right to such procedures. It thus granted rights to foster children on the basis of constitutional claims not raised, indeed opposed, by the children - the only party who had standing to proffer them.

There was no obstacle to the children's assertion of their own rights and interests through their own independent counsel and no basis for the district court to grant the foster parents standing to raise the children's claims.

NAACP v. Alabama, 357 U.S. 449 (1958);
Barrows v. Jackson, 346 U.S. 249 (1952).

Where this Court has accorded standing to parents to raise children's claims, e.g. Wisconsin v. Yoder, 406 U.S. 205 (1972), there was no conflict between the rights of the children and the parents, and no independent counsel appeared for the children arguing a position contrary to that of the parents.

Only in limited contexts, where there was an identity of interests and an interdependence of rights sufficient to insure the equally effective advocacy of claims, has this Court granted standing to one party to raise the rights of others. See Singleton v. Wulff, supra at 833-34; Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

Since the only party who had standing to seek additional procedures in the

name of due process never raised the claim, and explicitly and continuously opposed such relief, the court below erred in assuming jurisdiction of the due process issue and ordering more elaborate procedures.

II

THE FOSTER PARENT-CHILD RELATIONSHIP UNDER THE CIRCUMSTANCES PRESENTED IS NOT A PROTECTED INTEREST WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The due process requirements of the Fourteenth Amendment apply only where the liberty or property interest at stake rises to the level of a "protected interest." Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d. 18, 31 (1976); Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Perry v. Sinderman, 408 U.S. 593, 599 (1972). "Protected interests" include those interests created by federal or state statutes or derived from the existence of policies and practices promulgated by state officials and recognized by state law, Mathews v. Eldridge, supra at 32 (disability benefit payments);

Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (school suspension); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (cancellation of good-time credits); Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license suspension); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (welfare payments); or arising out of mutually explicit understandings, Perry v. Sinderman, 408 U.S. 593, 601 (1972) (non-tenured college employment); or involving a fundamental right, Morrisey v. Brewer, 408 U.S. 471, 482 (1972) (right to personal liberty); Speiser v. Randall, 357 U.S. 513 (1958) (First Amendment rights); Slochower v. Board of Education, 350 U.S. 551 (1956) (Fifth Amendment rights); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (First Amendment rights).

The district court incorrectly found that children have a right to a hearing before suffering the "grievous loss" of separation from the foster parent-child relationship. Whether the deprivation of a protected interest amounts to a "grievous loss" determines the extent of the process due, not whether due process applies in the first instance. Mathews v. Eldridge, U.S., 47 L.Ed. 2d 18, 31-32; Goss v. Lopez, supra at 575-76; Wolff v. McDonnell, supra at 560-61; Goldberg v. Kelly, supra at 253. Since there has been no determination and indeed there can be none that the foster parent-child relationship in the circumstances presented is a "protected interest", the district court must be reversed.

In determining whether due process applies, the Court assesses the "nature of the interest at stake," and looks to state

law to define those interests. Board of Regents v. Roth, supra at 570; Goss v. Lopez, supra at 576. In this case, State law governs the entire system of foster care including the terms of the foster parent-child relationship. Children, temporarily and voluntarily surrendered to an authorized agency by their natural parents, are placed in State certified foster homes by the agency under a written instrument.² This contract, by its terms, provides for the payment of a boarding

²

New York Social Services Law § 374 (McKinney 1976) authorizes placement of children in the care and custody of an authorized agency into foster homes. Foster parents must be certified by the agency to board minors under the age of eighteen and must be recertified each year. New York Social Services Law §§ 376 and 378 (McKinney 1976). An "authorized agency" as defined in New York Social Services Law § 371(10) (McKinney 1976) includes local public welfare children's bureaus and private voluntary child-care agencies under the supervision of the New York State Board of Social Welfare.

fee as well as clothing and medical costs.³ Most importantly, it reserves to the agency the right to terminate placement in the foster home at any time upon ten days' notice. Organization of Foster Families for Equality and Reform v. Dumpson, 411 F. Supp. 1144, 1148 (S.D.N.Y. 1976).

As the district court properly determined, the foster parent has no protected "property interest" in the foster parent-child relationship. The relationship is not within the meaning of a legal entitlement as defined by this Court in Board of Regents v. Roth, supra at 577 and Perry v. Sinderman, supra at 599 since

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The lower court noted that "[t]he defendant Catholic Guardian Society currently pays foster parents \$155 per month for each foster child boarded in their home, in addition to an allowance for clothing, medical, and dental expenses. This amount is typical of that paid throughout the state." Organization of Foster Families for Equality & Reform v. Dumpson, supra at 1149 n. 11.

its contractual basis nullifies any reasonable expectation of its uninterrupted continuation. There is no "mutual understanding" that the relationship will continue, Perry v. Sinderman, supra at 601.

It is equally clear that the foster parent-child relationship under the circumstances presented is not embraced by the fundamental right to personal liberty and familial privacy defined by this Court. This Court has protected the integrity of the natural family unit under the due process clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390 (1923), the equal protection clause, Skinner v. Oklahoma, 316 U.S. 535 (1942) and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479 (1965). The rights to conceive and raise one's natural children are deemed "essential," Meyer v. Nebraska, supra at 399, one of

the "basic civil rights of man," Skinner, supra at 541, and far more precious than property rights, May v. Anderson, 345 U.S. 528, 533 (1953). This Court has stated that "[i]t is cardinal that the custody, care, and nurture of the child reside first in the [natural] parents . . ." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Only a powerful countervailing interest warrants infringement upon the natural parents' interest in the children he or she has sired. Stanley v. Illinois, 405 U.S. 645, 651 (1972). As stated by this Court in Wisconsin v. Yoder, 406 U.S. 205, 232 (1972):

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

This Court's deference to the natural family derives support and authori-

ty from the Congress. Title XX of the Social Security Act under which funds are provided to the states for social services programs including foster care services, express our national goal to "preserve rehabilitate, and reunite families." 42 U.S.C.A. 1397 (3). Further, New York State provides, as part of its foster care services, "counselling with the parent... to improve home conditions and enable such child to return home...as soon as it is feasible."⁴

The foster parent-child relationship here is circumscribed by the terms of a contract reserving to the authorized agency discretion to remove the voluntarily-placed child at any time. That relationship deserves no deference under

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The Comprehensive Annual Social Services Program Plan for the State of New York for the Years 1975-76 (Vol. I, September, 1975, at page 48) includes such counselling in its definition of foster care services.

the Court's formulation of the right to personal liberty and familial privacy. Unlike the protected family relationship, the foster family has no biological basis. Its duration is limited and indefinite. The foster parent takes custody of the child aware that return to the natural parent is possible at any time. The natural parents reasonably expect to continue the care, nurturing and upbringing of their children if familial conditions warrant, within the first eighteen months of the placement without the necessity of a formalized adversarial hearing.⁵ Since there has been no finding that the natural parent

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New York Social Services Law §392 (McKinney 1976) affords foster parents a full evidentiary hearing prior to the transfer or removal of the foster child after placement with the family for eighteen months or more.

is unfit, the natural parent retains the fundamental right to personal liberty and familial privacy which embraces the right to direct and control the upbringing of the child. Stanley v. Illinois, 405 U.S. 645, 650 (1972).

This Court need not determine whether in all circumstances the foster parent-child relationship rises to the level of a protected interest within the meaning of the Fourteenth Amendment. All that the Court need determine is that when, as here, the natural parent is fit, the foster placement is voluntary and temporary, the foster parents knew and understood the child could be returned to the natural parent at any time and in the placing agency's sole discretion, the foster parent-child relationship is not a protected interest within the meaning of the due process clause.

III

ASSUMING THE FOSTER PARENT-CHILD RELATIONSHIP UNDER THESE CIRCUMSTANCES IS PROTECTED BY THE DUE PROCESS CLAUSE, THE RIGHT TO A HEARING PRIOR TO RETURNING THE CHILD TO THE NATURAL PARENTS IS ALREADY SATISFIED BY EXISTING REVIEW PROCEDURES.

Even if the foster parent-child relationship is a protected interest within the meaning of due process, existing procedures for pre-termination review of decisions to return children voluntarily placed in foster care to their natural parents are constitutionally sufficient.⁶ The substitute procedures ordered by the lower court are unnecessary and inappropriate under the circumstances of this case: they will only

⁶ New York Social Services Law §384-a(1) (McKinney 1976) permits temporary surrender of the custody of destitute children to authorized agencies.

create another bureaucratic overlay in a system which must avoid manipulating and ultimately destroying a parent-child relationship through a time-consuming and anxiety-producing administrative labyrinth.

It is well settled that the "very nature of Due Process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). Instead, the procedural safeguards required by due process depend upon the particular situation and the particular governmental and private interests involved. Morrisey v. Brewer, 408 U.S. 471, 481 (1972); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). Determinations of the constitutional adequacy of administrative review procedures call for the

assessment and balancing of three factors:

[F]irst, the private interest that will be affected by public action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, U.S. ___, 47 L.Ed. 2d 18, 33 (1976).

Accord, Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1961).

Applying these factors against the backdrop of the review procedures available to foster parents under state statutes and regulations shows that under the test enunciated in Cafeteria and Restaurant Workers Union, supra, and its progeny, due process is satisfied in

this case.⁷

Existing State Statutory And Regulatory Review Procedures

Under local regulations, 18 N.Y.C.R.R. §450.10 (1974) foster parents are notified of proposals to return children voluntarily placed in foster care to their natural parents and are advised of their right to request a conference with the authorized agency making the decision. At this pre-termination conference, foster parents, who may be accompanied by a representative, are advised of the reasons for the proposed return of the child to its natural parents and may "submit reasons why the child should not be removed" from their care. 18 N.Y.C.R.R. §450.10(a) (1974).

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For the purposes of this brief, amici do not dispute the lower court's determination of the review procedures presently available, but its conclusion that these procedures are constitutionally inadequate.

New York Social Services Law §392

(McKinney 1976) affords foster parents with children in their care for eighteen months or more an additional opportunity to contest the return of a child to its natural parents prior to the child's removal from the foster home. This section requires authorized agencies charged with the custody and care of the child to petition the Family Court for a review of foster care status (hereinafter "§392 review") eighteen months after the child has been in a foster home. New York Social Services Law §392(2)(a) (McKinney 1976). Foster parents and natural parents may also petition for the §392 review. New York Social Services Law §392(2)(c) (McKinney 1976). After the initial §392 review, the family court retains jurisdiction and conducts subsequent review proceedings upon the

request of the authorized agency, foster parents, natural parents or upon its own motion, but at least every two years. New York Social Services Law §392(10) (McKinney 1976). In situations where the child was voluntarily placed in foster care by the natural parents, the court enters an order of disposition at each §392 review directing that foster care be continued, that the child be returned to the natural parents, or that proceedings be initiated to free the child for adoption. Social Services Law §392(7) (McKinney 1976).

Since §392 reviews are governed by the New York Civil Practice Laws and Rules to the same extent as other Family Court proceedings, foster parents receive a full evidentiary hearing including an impartial hearing officer, the right to present, confront and cross-

examine witnesses, and the right to ⁸ counsel.

The decision of an authorized agency to return a child to its natural parents is not final. Once a child is returned to its home, the foster parents have the right to appeal to the local department of social services for a full hearing to contest the removal of the child from the foster home. New York Social Services Law §400(2) (McKinney 1976). If they are dissatisfied with the outcome of the appeal, they may petition for judicial review. Id.

In In re L., 353 N.Y.S. 2d 317 (Fam. Ct. 1974), and Matter of Carla L., 357 N.Y.S. 2d 987 (App. Div. 1st Dept. 1974), N.Y. Social Services Law §392(McKinney 1976) was deemed to be a part of the Family Court Act and, thus, governed by the Civil Practice Law and Rules pursuant to §165 of the Family Court Act. (McKinney 1975). In addition, the foster parents have a right to counsel and to assigned counsel if they are indigent. (Chapter 682 Laws of 1975).

Existing Procedures Strike a Constitutional Accommodation of All Private Interests Affected By The Return of a Child To The Natural Parents

The precise nature of the opportunity to be heard depends on a balancing of the concerned private and governmental interests. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 18, 33 (1976); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Morrisey v. Brewer, 408 U.S. 471, 481 (1972); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951). This balancing process may involve a weighing of competing constitutional rights. Mitchell v. W. T. Grant Co., supra. Whether due process is triggered by a property or a liberty interest, the weighing process is the same.

Assuming that the foster parent-child relationship is entitled to the

protections of due process after only one year, the application of this balancing approach in this case reveals that the statutory and regulatory scheme "effects a constitutional accommodation of the conflicting interests of the parties". Mitchell v. W.T. Grant Co., supra at 607. Existing procedures recognize the primacy of the natural parent-child relationship without ignoring the interests of the foster parents or treating children as mere chattels.

Under New York law, People ex rel., Kropp v. Shepsky, 305 N.Y. 465, 469 (1953), Spense Chapin Adoption Services v. Polk, 29 N.Y. 2d 196, 324 N.Y.S. 2d 937, 939 (Ct. App. 1971), as the court below recognized and accepted, the natural parent-child relationship enjoys a "primacy" which should not be disturbed unless a parent is unfit, has abandoned the child, or

surrendered it for adoption. Organization of Foster Families for Equality and Reform v. Dumpson, 411 F.Supp. 1144, 1150 (S.D.N.Y. 1976). This principle is firmly established by the decisions of this Court in Stanley v. Illinois, 405 U.S. 645 (1972); in May v. Anderson, 345 U.S. 528 (1953), and Meyer v. Nebraska, 262 U.S. 390 (1923). Even the State's interest in the welfare of children is "de minimus" if the natural parent is fit. Stanley v. Illinois, *supra* at 658.

Voluntary placement in foster care is not a permanent committal, Social Services Law §384-a(4) (McKinney 1976); nor is it a relinquishment of the right to be free from state interference with the pre-eminent natural family relationship recognized by this Court in Meyer, *supra*; May, *supra*; and Stanley, *supra*. Boone v. Wyman, 295 F.Supp. 1143, 1149 (S.D.N.Y. 1969); aff'd 412 F.2d 857 (2d Cir. 1969);

cert. denied, 396 U.S. 1024 (1970); citing People ex. rel. Anonymous v. N.Y. Foundling Hospital, 12 N.Y. 2d 863 (Ct. App. 1962). Under the temporary surrender agreement signed by the natural parents, there is every expectation that this family unit will be reunited as soon as circumstances permit. New York law requires that the temporarily surrendered child be returned to the natural parents within ten days of their request, unless it would be contrary to the terms of the surrender agreement, or an order is issued in a §392 review, or the parent has been adjudicated neglectful, abusive, otherwise unfit or to have abandoned the child. New York Social Services Law §384-a(2) (McKinney 1976). No inference of parental unfitness arises from voluntary placement. On the contrary, local regulations of the New York City Department of Social Services prohibit accept-

ance of voluntary placements where there is a possibility of child abuse or neglect, requiring instead that the agency report these cases to the Central Registry of Child Abuse for investigation and the institution of judicial proceedings to terminate parental rights, if indicated.⁹

Unlike the natural parent-child relationship, eventual termination is an element of the foster parent-child relationship where custody of the child has been surrendered only temporarily by the natural parents. New York Social Services Law §§383(2) & 400(1) (McKinney 1976) and the foster care contract itself

⁹ The City of New York - Human Resources Administration, Department of Social Services - Special Services for Children, SSC Procedure No. 21 III A.1. (February 18, 1976) (Appendix) provides in relevant part: "A planning caseworker shall not accept a...Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect." New York Social Services Law §422 (McKinney 1976) authorized the establishment of the Central Registry of Child Abuse.

acknowledge the right of the authorized agency to remove the child from the foster home. As part of this process, foster parents are accorded a full evidentiary review under Social Services Law §392 (McKinney 1976) after the child has been in foster care for eighteen months or more.¹⁰

Although the weight attached to a "liberty" interest does not determine the applicability of due process in the first instance, it is a factor in determining how extensive and elaborate process should be. Goss v. Lopez, 419 U.S. 563, 576 (1975). This is especially true

¹⁰ Organization of Foster Families for Equality and Reform v. Dumpson, 411 F.Supp. 1144, 1148 (S.D.N.Y. 1976): "The contract employed by the Catholic Guardian Society, typical of those used throughout the state, reserves the agency the right to recall the child 'upon request, realizing that such request will only be made for good reason.'"

when, as here, two competing interests must be accommodated. Determining that the interests of the foster parents are minimal before eighteen months of foster care, the State still affords these foster parents the opportunity to request a pre-termination conference to contest the return of the child to its natural parents by challenging their fitness. Where a child has been temporarily surrendered to an authorized agency, the only grounds for refusing to return the child to his natural parents is their fitness; not the superiority of foster care. New York Social Services Law §384-a(2) (McKinney 1976).

The court below in ordering more extensive procedures failed to consider the impact on the natural parent-child relationship of further delays on their anticipated reunion.

The State's Interests

The function of the State in providing temporary foster care to destitute children whose parents are unable to care for them because of transient circumstances is to preserve the natural family unit and to protect children.¹¹ These are compatible and need not be competing interests. Decisions to return these children to their parents once the circumstances that separated them are ameliorated reflect these State

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The Comprehensive Annual Social Services Program Plan for the State of New York for the year 1975-1976 (Volume I, September, 1975 at page 48) includes in its definition of foster care services "counseling with the parent... to improve home conditions and enable such child to return to his home...." New York Social Services Law §398(2)(a) (McKinney 1976) requires public welfare officials to "[i]nvestigate the alleged neglect, abuse or abandonment of a child, offer protective social services to prevent injury to the child, to safeguard his welfare, and to preserve and stabilize family life wherever possible"

interests. By imposing more extensive hearing procedures, the district court delays realization of the State's objective of maintaining natural family relationships. The review procedures in the child care system are tailored to the purpose of that system: responding to the needs of children and their families.

In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), "the balance of hurt complained of and good accomplished" was identified as an important consideration in due process analysis. Recognizing the value of preserving the natural family, the State has fashioned procedures which accomplish this goal. Once the obstacles that separated the family are overcome, an expedited process is employed with the aim of reuniting parent and child, without depriving the foster family of a fair

opportunity to raise objections to this reunion.

State policy of protecting children is also best served by the less complex review procedures presently available. Parents will be discouraged from placing children in the temporary care and custody of public child care officials when circumstances require it, if regaining custody is unduly delayed, problematic, and fraught with unnecessary procedural obstacles.

The judgment of the State legislature regarding pre-termination procedures best suited to accommodate all the diverse private and governmental interests involved in temporary foster care should not have been disturbed by the court below. Particularly where the procedural scheme is fair and seeks to minimize the risk of error; Cf. Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 18, 41 (1976); Ar-

nett v. Kennedy, 416 U.S. 134, 204 (1974).

Courts should not substitute their judgment for that of the state legislatures.

Existing Procedures Adequately Safeguard Against Erroneous Decisions To Return A Child To Its Natural Parents

The administrative decision to return a child temporarily placed in foster care to his natural parents requires only that the agency determine that the natural parents once again are able to care for their child. The adequacy of the foster care received by the child is not at issue. Disregarding the voluminous information already gathered and in the possession of child care agencies, the district court cited the need for an "organized forum" to gather necessary information in ordering substitute review proceedings. Organization of Foster Families For Equality and Reform v. Dumpson, 411 F. Supp. 1144, 1150 (S.D.N.Y. 1976).

A voluntary placement is accepted by an agency only after a diagnostic intake study to examine the family situation is performed. 18 N.Y.C.R.R. §606.14(a) (1976). This study is designed to reveal any indices of possible child abuse or neglect which would preclude voluntary placement and require involuntary termination of parental rights pursuant to Article 10 of the Family Court Act, §1012 et seq. (McKinney 1975).¹² Once a child is accepted into foster care, an agency worker must meet with the natural family every two weeks during the first three months of placement and once a month thereafter. 18 N.Y.C.R.R. §606.15(b) (2) & (3) (1976).

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New York City Department of Social Services-Special Services For Children, Procedure No. 21, III A. 1., (February 18, 1976) provides that a "caseworker shall not accept a...Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect."

Foster parents and the children temporarily in their care are also interviewed on a regular basis. The information elicited in these conferences is used to assist the families involved and is also maintained in case files. Thus, sufficient information is available to the child care official from agency worker investigations and conferences to guard against the risk of erroneous determinations of parental fitness.

Fault was also found with the pre-termination conference held by the child care official with foster parents because "the public official with whom they confer is already acquainted with the agency's version of the background facts." Organization of Foster Families For Equality and Reform v. Dampson, 411 F. Supp. 1144, 1151 (S.D.N.Y. 1976). Prior knowledge of the agency's information regarding the fitness of a natural parent does not prevent a child care official charged with protecting child-

ren's welfare from rendering an impartial and correct decision. Withrow v. Larkin, 421 U.S. 35, 47-55 (1975); Richardson v. Perales, 402 U.S. 389, 410 (1971). In fact, any agency official who disregards reasonably based foster parent claims of past or potential child neglect or abuse by natural parents would be criminally and civilly liable. Social Services Law §420 (McKinney's 1976). In Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), one of the factors identified for assessing the process due in a particular situation was the "protection implicit in the office of the functionary whose conduct is challenged." In any event, familiarity of the initial decision maker with the facts does not compromise due process requirements where subsequent reviews by impartial decision-makers are available. Arnett v. Kennedy, 416 U.S. 134, 170 (1974).

The lower court also erred in ruling that the procedures were constitutionally defective by failing to guarantee foster parents the right to present witnesses. The right to present witnesses, an element of an evidentiary hearing, is not always required by due process. In Mathews v. Eldridge, ___ U.S. ___, 47 L.Ed. 2d 18, 37 (1976), this Court found that an evidentiary hearing with an opportunity to present witnesses was not required prior to the termination of disability insurance benefits although the recipient would suffer a significant deprivation. Similarly, in Wolff v. McDonnell, 418 U.S. 539 (1974) even though the deprivation of "good-time credits" which affect the eligibility date of prison inmates for parole was labeled a "grievous loss," an evidentiary hearing with the right to present witnesses was not determined as

necessary for purposes of due process. In fact, "[o]nly in Goldberg has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation." Mathews, supra at 36. Due process may be satisfied through informal conferences and a formal hearing need not be conducted in an "organized forum." In Goss v. Lopez, 419 U.S. 565, 582 (1975), this Court found that an informal conference between a high school student and the principal or other disciplinarian prior to suspension of the student would satisfy the requirements of due process.¹³

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The failure to provide an opportunity to present witnesses is particularly reasonable within the context of the New York child care system. A foster parent need not substantiate claims of parental unfitness with witnesses before the child care official must take action to prevent further harm to the child. See discussion of §420 Social Services Law (McKinney's 1976), supra at 49.

State law, New York Social Services Law §392 (McKinney 1976), permits the foster parents of children in foster care for eighteen months or more to petition the family court for a review which accords foster parents a full evidentiary hearing.¹⁴ No reason was given by the lower court for substituting its judgment for that of the New York legislature in requiring that a formal hearing be accorded to foster parents after only one year rather than after eighteen months.

The Court erred in finding that the existing pre-termination procedures, both the conference and the §392 review for

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The review proceedings available under §392 Social Services Law (McKinney's 1976) are described on page 33 supra.

placements of eighteen months or more, were constitutionally deficient because the child could not initiate either, nor participate in the conference. Reunion of the natural family may be prevented only if the natural parent is adjudicated neglectful, abusive or demonstratively unfit. Social Services Law §384-a(2) (McKinney's 1976). It is a rare exception where the child care agency, through its on-going investigations and authorization to initiate proceedings to terminate parental rights, and the foster parent through initiation of existing procedures will fail to protect the child's interest in being returned only to a fit parent. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exception." Mathews v. Eldridge, ___ U.S. ___,

47 L.Ed. 18, 39 (1976).

By ordering that formal pre-termination procedures be initiated automatically in all cases, the district court responded to the rare exception that the unfitness of a parent will not be revealed under the present scheme. These additional, unnecessary safeguards present greater bureaucratic obstacles to the realization of the state and natural parents and children's interests in the reunion of the natural family.

CONCLUSION

For all the foregoing reasons, the decision of the district court should be reversed insofar as it imposes additional procedures before a voluntarily placed child is returned to the natural parent.

Dated: November 22, 1976

Respectfully submitted,

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(Appendices Follow)

APPENDICES

APPENDIX ATHE CHALLENGED STATUTES
AND REGULATIONS

New York Social Services Law §383
(2): The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

New York Social Services Law §400:
Removal of Children.

1. When any child shall have been placed in an institution or in a family home by a commissioner of public welfare or a city public welfare officer, the commissioner or city public welfare officer may remove such child from such institution or family home and make such disposition of such child as is provided by law.

2. Any person aggrieved by such decision of the commissioner of public welfare or city welfare officer may appeal to the department, which upon receipt of the appeal shall review the case, shall give the person making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. The department may also, on

its own motions, review any such decision made by the public welfare official. The department may make such additional investigation as it may deem necessary. All decisions of the department shall be binding upon the public welfare district involved and shall be complied by the public welfare officials thereof.

18 N.Y.C.R.R. §450.10* Removal from foster family care.

(a) Whenever a social services official or another authorized agency acting on his behalf proposes to remove a child in foster family care from the foster family home, he or such other authorized agency, as may be appropriate, shall notify the foster family parents, in writing of the intention to remove such child at least 10 days prior to the proposed effective date of such removal, except where the health or safety of the child requires that he be removed immediately from the foster family home. Such notification shall further advise the foster family parents that they may request a conference with the social services official or a designated employee of his social services department at which time they may appear, with or without a representative to have the proposed action reviewed, be advised of the reasons therefor and be afforded an opportunity to submit reasons why the child should not be removed. Each social services official shall instruct and re-

* This regulation was numbered 450.14 until September 18, 1974.

quire any authorized agency acting on his behalf to furnish notice in accordance with the provisions of this section. Foster parents who do not object to the removal of the child from their home may waive in writing their right to the 10 day notice, provided, however, that such waiver shall not be executed prior to the social services official's determination to remove the child from the foster home and notifying the foster parents thereof.

(b) Upon the receipt of a request for such conference, the social services official shall set a time and place for such conference to be held within 10 days of receipt of such request and shall send written notice of such conference to the foster family parents and their representative, if any, and to the authorized agency, if any, at least five days prior to the date of such conference.

(c) The social services official shall render and issue his decision as expeditiously as possible but not later than five days after the conference and shall send a written notice of his decision to the foster family parents and their representative, if any, and to the authorized agency, if any. Such decision shall advise the foster family parents of their right to appeal to the department and request a fair hearing in accordance with section 400 of the Social Services Law.

(d) In the event there is a request for a conference, the child shall not be removed from the foster family home until at least three days after the notice of decision is sent, or prior to the proposed effective date of removal, whichever occurs later.

(e) In any agreement for foster

care between a social services official or another authorized agency acting on his behalf and foster parents, there shall be contained therein a statement of a foster parent's rights provided under this section.

APPENDIX B

THE CITY OF NEW YORK -
HUMAN RESOURCES ADMINISTRA-
TION DEPARTMENT OF SOCIAL
SERVICES - SPECIAL SERVICES
FOR CHILDREN

SUBJECT: VOLUNTARY PLACEMENT AGREEMENTS

**TO : Executive Directors, Voluntary
Child Care Agencies Staff,
Special Services for Children**

**FROM : Carol J. Parry, Assistant
Commissioner Special Services
for Children**

**SSC PROCEDURE NO. 21
February 18, 1976**

III. GENERAL INSTRUCTIONS

**A. Possible Child Abuse or Neglect
Situations**

1. A planning caseworker shall not accept a Form W-864, Voluntary Agreement, from an available parent or guardian when the initial survey in the diagnostic study reveals the possibility of child abuse or neglect; regardless of whether the situation came to SSC's attention through a report to the Central Registry, by other source of referral, or by personal application; and, even if the parent or guardian desires removal of the child

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from the home and is willing to sign a Voluntary Agreement. If such a situation has not already been reported to the Central Registry, the caseworker shall make a report immediately.